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FILED
MAY 23 1961
JAMES R. BROWNING, Clerk

No. 844

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. D1–D6) is reported at 284 F. 2d 861. The opinion denying the petition for rehearing (Pet. E–1) is not yet reported. The Board's decision and order (R. 38–48)[1] are reported at 125 NLRB 454.

JURISDICTION

The decision of the court of appeals was rendered on November 28, 1960 (Pet. D1–D6). The petition for rehearing was denied on December 27, 1960 (Pet. E–1). The petition for a writ of certiorari was filed

[1] "R" refers to the appendix to the Board's brief filed with the court below.

on March 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board was warranted in concluding that the employer and the union unlawfully discriminated against employee Lopuch by reducing his seniority status.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 73 Stat. 545, 29 U.S.C. 151 *et seq.*) are set forth in the Appendix to the petition (Pet. A1–A3).

STATEMENT

A. The Board's findings of fact

The Company (Miranda Fuel) is a New York corporation which is engaged in the business of selling and distributing coal, fuel and related products (R. 53). For a number of years, petitioner Union has represented the Company's truck drivers and has maintained collective bargaining agreements with the Company covering the drivers' terms and conditions of employment (R. 53; 4, 70–71).

In April, 1957, truck driver Lopuch, an employee for approximately eight or nine years, requested permission from Company President Miranda for a leave of absence to attend to personal affairs in Cleveland, Ohio (R. 40, 55; 5, 24–25). Lopuch's leave commenced at the end of the working day of April

12 (R. 40, 55; 5–6, 24–26). On October 10, 1957, Lopuch telephoned Miranda and informed him that he expected to return to work about October 15 (R. 40, 55; 26–27, 30). Prior to his departure from Cleveland, however, Lopuch became ill (R. 40–41, 55; 6–7, 27). On October 19, Lopuch notified the Company that he would be unable to report to his job until October 30 (R. 40, 55–56; 26, 31–32).

Lopuch was number 11 on the Company's seniority list before his leave of absence (R. 41, 56; 4, 23). Upon his return, however, the Union, upon the urging of other employees, insisted on, and the Company acquiesced in, reducing Lopuch to number 21, the bottom of the seniority list (R. 41, 56; 8–9, 10–12, 18–21, 27–29, 35). This resulted in the loss of some Saturday employment for Lopuch (R. 56; 15, 28–29).

The Union sought the reduction in seniority on the ground that Lopuch's leave had violated Section 8 of the contract. Under the contract, the slack season is defined as April 15 to October 15, and an employee taking leave within that period may do so without prejudice to his seniority standing, provided he reports back by October 15.[2] The Union first con-

[2] Section 8 of the contract provided (R. 41–42, 55; 70–71):

"During the slack season April 15 to October 15, any employee who according to seniority would not have steady employment shall be entitled to a leave of absence and maintain his full seniority rights during that period. Any man so described must report to the Shop Steward not later than 8:00 A.M. on October 15 and sign the seniority roster in order to protect his seniority, and the Employer agrees to accept the certification of said Shop Steward as to the availability of such men when called by the Employer. If October 15 falls on

tended that Lopuch had improperly returned to work after October 15 (R. 40–41, 56–57; 8–9, 18–21, 27–32). Then, when it learned that this was due to an excused illness, the Union based its demand on the fact that Lopuch had started his leave before April 15 (R. 41, 56–57; 9–12, 21–22, 30). Miranda, who did not believe that Lopuch's early departure would cause a loss of seniority under the contract, nevertheless acquiesced in the Union's demand because on matters affecting seniority he let the Union decide "the difference between right and wrong" (R. 42).

B. The Board's conclusions and order

The Board held that the reduction in Lopuch's seniority constituted unlawful discrimination, within the meaning of Sections 8(a)(3) and 8(b)(2) of the Act. In the Board's view, the Union had been delegated unilateral control over seniority by the contract, and, in any event, Lopuch's leave of absence did not contravene the contract. Accordingly, in effecting a change in Lopuch's seniority, the Union demonstrated that it had power to cause discrimination at will, thereby encouraging employees to comply with Union rules and otherwise to stay in the Union's good graces. (R. 39, 42, 58–59.)

The Board's order (R. 43–51) required the Company and Union to cease and desist from unlawfully depriving Lopuch of seniority, and from giving effect to any contractual provision delegating to the Unio-

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Saturday or Sunday, the reporting day shall be the next work day. Any man failing to report as above specified shall forfeit all seniority rights.

final control over the seniority status of the Company's employees. Affirmatively, the order required the Company to restore Lopuch to his former position of seniority, and required the Union to notify both the Company and Lopuch that it had no objection to the restoration of Lopuch to his proper place on the seniority roster. In addition, both parties were ordered jointly and severally to reimburse Lopuch for any loss of pay arising out of the unlawful loss of seniority, and were also directed to post appropriate notices.

C. The decision of the court of appeals

The court of appeals, although it did not accept the Board's finding that the seniority clause of the contract delegated unilateral control over seniority to the Union, agreed that the reduction of Lopuch's seniority was not authorized by the contract. The court further agreed that the exercise of such unfettered control over seniority in this case tended to encourage union membership, and thus enforced the Board's order insofar as it undertook to remedy the discrimination against Lopuch. (Pet. D1–D6, E1.)

THE BOARD'S POSITION

This case presents the question of whether the Company and the Union violated the provisions of the National Labor Relations Act forbidding discrimination in employment to encourage union membership, by reducing the seniority status of an employee for reasons unauthorized by the seniority clause of the collective bargaining agreement between the Company

and the Union. The Board and the court below found a violation. However, subsequently this Court decided *Local 357, Teamsters* v. *National Labor Relations Board,* No. 64, this term, April 17, 1961, which clarifies the meaning of the discrimination provisions of the Act and the elements required to establish a violation thereof. The Board believes that it would be appropriate to reexamine its decision in this case in the light of *Local 357*. Accordingly, the Board is of the view that the petition for certiorari should be granted, the judgment of the court below vacated, and the case returned to that court with instructions to remand it to the Board for reconsideration and such further proceedings as it may deem warranted in view of *Local 357*.

Respectfully submitted.

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MAY 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961